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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Denny's, Inc., a California corporation;
DFO, LLC, a Delaware limited liability
company,

Plaintiffs,

v.

Kennedy Restaurants, L.L.C., an Arizona
limited liability company; Sandra D.
Kennedy and John Doe Kennedy, husband
and wife; M. C. Burton, Jr., and Jane Doe
Burton, husband and wife,

Defendants.

Kennedy Restaurants, L.L.C., an Arizona
limited liability company; Sandra D.
Kennedy and M. C. Burton, Jr.,

Counterclaimants,

v.

Denny's, Inc., a California corporation;
DFO, LLC, a Delaware limited liability
company,

Counterdefendants.

No. 2:09-cv-00741-SRB

**MOTION FOR SUMMARY
JUDGMENT RE: ENFORCEMENT
OF TERMINATION AND
DEFENDANTS' COUNTERCLAIM
AND FOR A PERMANENT
INJUNCTION**

1 **I. INTRODUCTION**

2 In March 2009, Denny's terminated the parties' franchise agreement based on
3 Defendants' repeated failure to pay their franchise fees in a timely manner. Denny's then
4 filed this action, seeking a preliminary injunction to prevent Defendants from continuing
5 to use Denny's name and trademarks. Following an evidentiary hearing on September 3,
6 2009, the Court denied Denny's application for injunctive relief. In its eight-page ruling
7 [Doc. #63], the Court "assume[d] for purposes of this Order that Plaintiffs are likely to
8 succeed on the merits," but denied the motion on other grounds. *See* Order at p. 6. The
9 Court's ruling allowed Defendants to continue operating their Denny's[®] restaurant until
10 the merits of the case have been decided.

11 Denny's now asks the Court to decide the merits, and enforce Denny's termination
12 of the franchise. The parties' franchise agreement expressly permits Denny's to terminate
13 if Defendants breached the agreement four or more times in any 12-month period. As the
14 undisputed evidence shows, Kennedy Restaurants breached the agreement by paying their
15 rent and franchise fees late on *15 separate occasions* between August 2008 and January
16 2009, a period of only six months. As a matter of law, the termination was proper in light
17 of those 15 late payments.

18 Since the denial of Denny's preliminary-injunction motion, Kennedy Restaurants
19 has stopped paying rent and royalties altogether. For the past 12 weeks, Kennedy
20 Restaurants has not paid *a single penny in rent or royalties*. It has failed even to *report* its
21 sales for the past four weeks, which also constitutes a breach of the parties' agreements.
22 In total, Kennedy Restaurants now owes Denny's more than \$39,000 in past-due royalties
23 and rent. Clearly, in denying Denny's injunction motion, the Court did not intend to allow
24 Defendants to continue receiving the benefits of the franchise relationship without paying
25 for it. Yet, that is exactly what they are trying to do.
26

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1 In any event, because it is undisputed that Kennedy Restaurants' royalty and rent
 2 payments were late – and continue to be late – and because Denny's is contractually
 3 entitled to terminate the parties' agreements based on the late payments or the total failure
 4 to pay, the Court should grant summary judgment on Counts Four and Five of Denny's
 5 Complaint. In connection with that ruling, the Court should also: (1) issue a permanent
 6 injunction prohibiting Defendants from using the Denny's[®] name and trademarks; and (2)
 7 issue an order directing Defendants to immediately surrender the leased premises.

8 The Court should also grant summary judgment in favor of Denny's on
 9 Defendants' Counterclaim. The Counterclaim is based on two unfounded factual
 10 premises. First, Defendants allege that Denny's breached the parties' agreements by
 11 seeking to terminate the agreements in March 2009. Because Denny's was legally entitled
 12 to terminate the parties' agreements, it is entitled to summary judgment on that portion of
 13 Defendants' Counterclaim. Second, Defendants contend that Denny's has "overcharged"
 14 them for rent. This claim is likewise unfounded. Denny's charged the rent that
 15 Defendants agreed to pay in the sublease and a subsequent amendment, and nothing more.
 16 Accordingly, Denny's is also entitled to judgment on Defendants' rent-overcharge claim.

17 **II. FACTUAL BACKGROUND**

18 **A. The Franchise Agreement**

19 Denny's operates a nationwide chain of restaurants, most of which are operated by
 20 franchisees. *See* Statement of Facts of Denny's Inc. and DFO, LLC, in Support of Their
 21 Motion for Partial Summary Judgment ("SOF"), ¶¶ 1-7. On October 24, 1995, Kennedy
 22 Restaurants entered into a "DFO, Inc. Franchise Agreement" (hereinafter, "Franchise
 23 Agreement") with DFO, Inc., the predecessor-in-interest to DFO, LLC. SOF, ¶ 8. Under
 24 the Franchise Agreement, DFO granted Kennedy Restaurants the right to operate a
 25 Denny's[®] restaurant located at 4303 West Glendale in Glendale, Arizona (the
 26

1 “Restaurant”). SOF, ¶ 9. A true and correct copy of the Franchise Agreement is attached
 2 as Exhibit 1 to Plaintiffs’ Complaint.

3 The Franchise Agreement required Kennedy Restaurants to pay DFO “[f]or the use
 4 of the Denny’s Marks and the availability of Company supplied supervisory, training and
 5 other professional personnel, a weekly royalty fee in the sum of four percent (4%) of [the
 6 Restaurant’s] weekly gross sales” (hereinafter “Royalty Fees”). SOF, ¶ 10; Franchise
 7 Agreement, § 6.1(b). The Franchise Agreement also required Kennedy Restaurants to pay
 8 DFO “[a] fee for advertising, public relations and promotion and for the creation and
 9 development of public relations and promotional campaigns . . . in the amount of two
 10 percent (2%) of [the Restaurant’s] weekly gross sales” (hereinafter “Ad Fees”).
 11 SOF, ¶ 11; Franchise Agreement, § 6.1(c).

12 Under the terms of the Franchise Agreement, the operating, accounting, and billing
 13 period ends at 3:00 p.m. on Wednesday of each week. SOF, ¶ 12. Kennedy Restaurants
 14 is required to submit payment for Royalties and Ad Fees for that week no later than the
 15 Friday immediately following the Wednesday week-ending date. SOF, ¶ 13. For
 16 example, if the week-ending date is Wednesday, December 16, 2009, Kennedy
 17 Restaurants’ weekly royalty and rent payment would be due on Friday, December 18,
 18 2009. SOF, ¶ 14.

19 **B. The Sublease Agreement**

20 Also on October 24, 1995, Kennedy Restaurants entered into a “Sublease –
 21 Restaurant” (hereinafter, “Sublease”) with Denny’s, Inc., under which Denny’s subleased
 22 to Kennedy Restaurants the premises on which the Restaurant is located (the “Premises”).
 23 SOF, ¶ 15. A true and correct copy of the Sublease Agreement is attached as Exhibit 2 to
 24 Plaintiffs’ Complaint.

The Sublease initially required Kennedy Restaurants to make weekly rental payments to Denny's in the amount of \$1,539. SOF, ¶ 16; Sublease, § 3(a). With property taxes, the total amount due was \$1,596.69. SOF, ¶ 16. However, on or about May 31, 2003, the parties executed a First Amendment of Sublease, which lowered the rental payments to \$1,553.69 per week. SOF, ¶ 17. The operating, accounting, and billing period for the Sublease ends each Thursday morning at 7:00 a.m. SOF, ¶ 18; Sublease, § 3(c). Kennedy Restaurants is required to submit its rental payment for that week no later than the Friday immediately following the Thursday week-ending date. SOF, ¶ 19. For example, if the week-ending date is Thursday, December 17, 2009, Kennedy Restaurants' weekly rental payment would be due on, and must be postmarked by, Friday, December 18, 2009. SOF, ¶ 20.

C. Denny's Termination of the Agreements Based on Kennedy Restaurants' Chronic History of Late Payments

Kennedy Restaurants undisputedly defaulted on its obligations under the Franchise Agreement more than four times during a six-month period spanning August 2008 and January 2009. SOF, ¶ 26. As a matter of undisputed fact, Kennedy Restaurants paid its weekly royalty and rent payments late *at least 15 times* during that timeframe.

As Denny's Manager of Franchise and Lease Accounting, William L. Turner, testifies in his Declaration, Kennedy Restaurants paid royalties and rent late on the following dates:

No.	Week-Ending Date	Payment Due Date	Date Payment Received	Number of Days Late
1.	8/13/2008	8/15/2008	10/24/2008	70
2.	8/20/2008	8/22/2008	10/24/2008	63
3.	8/27/2008	8/29/2008	11/19/2008	82
4.	9/3/2008	9/5/2008	12/1/2008	87

1	5.	10/1/2008	10/3/2008	2/6/2009	126
2	6.	10/8/2008	10/10/2008	12/15/2008	66
3	7.	10/15/2008	10/17/2008	12/12/2008	56
4	8.	11/5/2008	11/7/2008	12/12/2008	35
5	9.	11/12/2008	11/14/2008	12/18/2008	34
6	10.	11/19/2008	11/21/2008	12/26/2008	35
7	11.	11/26/2008	11/28/2008	12/26/2008	28
8	12.	12/31/2008	1/2/2009	5/5/2009	123
9	13.	1/7/2009	1/9/2009	4/6/2009	87
10	14.	1/14/2009	1/16/2009	4/6/2009	80
11	15.	1/21/2009	1/23/2009	3/30/2009	66

12 SOF, ¶ 26. Based on these 15 late payments between August 2008 and January 2009,
 13 Plaintiffs terminated both the Franchise Agreement and the Sublease by letter dated
 14 March 19, 2009 (“Notice of Termination”). SOF, ¶ 27.¹

15 **D. Kennedy Restaurants Has Continued Its Pattern of Late**
 16 **Payments Following the Termination.**

17 As the Court is aware, Kennedy Restaurants has continued to operate the
 18 Restaurant since the March 19, 2009 termination notice. During this time, its payment
 19 history is no better than before the issuance of the termination notice. SOF, ¶ 28. In fact,
 20 it’s worse:

21 • In the 37 weeks following the March 19, 2009 termination, Kennedy
 22 Restaurants has paid its royalties and rent late *all 37 times*. The payments have been
 23 made anywhere from ten to 119 days late. SOF, ¶ 29.

24
 25 ¹ A true and correct copy of the Notice of Termination is attached as Exhibit 3 to
 26 Plaintiffs’ Complaint.

1 • Kennedy Restaurants has not paid *any* royalties at all for the past 12
2 *consecutive billing periods*. SOF, ¶ 30.

3 • Kennedy Restaurants has not submitted *any* weekly sales reports for the four
4 most recent weekly billing periods. SOF, ¶ 31.

5 • The total amount of rent and royalties that Kennedy Restaurants currently
6 owes is more than \$39,000. This figure includes payments that were due in *August*, and
7 the most seriously delinquent of these payments was 117 days past due as of December
8 16. SOF, ¶ 32.

9 **III. ARGUMENT**

10 **A. As a Matter of Law, Denny's Termination of the Franchise** 11 **Agreement and Sublease Was Proper.**

12 The Franchise Agreement contains a provision that allows for termination based on
13 a franchisee's chronic defaults. SOF, ¶ 21. Specifically, Section 18.2(i) provides that
14 DFO may immediately terminate the Franchise Agreement, without prior notice to the
15 franchisee, if during any 12-month period, the franchisee fails on *four or more occasions*
16 to comply with one of more standards or requirements of the Franchise Agreement,
17 including payment obligations. SOF, ¶ 22. Even if the franchisee ultimately cures the
18 default, the "four strikes" provision still allows DFO to terminate. SOF, ¶ 23; Franchise
19 Agreement, § 18.2(i).

20 The Sublease also contains a "cross-default" provision. SOF, ¶ 24. Section 16 of
21 the Sublease describes certain events that constitute a default of the Sublease. Among
22 other things, a franchisee is deemed to have defaulted under the Sublease if the franchisee
23 "defaults under the terms of a franchise agreement with the Sublessor for the Premises or
24 any other agreement between Sublessor, its subsidiaries, parent company or
25 affiliates" SOF, ¶ 24; Sublease, § 16. In other words, if the franchisee defaults on
26

1 the Franchise Agreement with DFO, LLC, it is also deemed to be in default of the
 2 Sublease with Denny's, Inc.

3 In this case, Kennedy Restaurants defaulted on its payment obligations to Denny's
 4 at least 15 times between August 2008 and January 2009. Denny's was entitled to
 5 terminate based on only four defaults. Thus, Denny's March 19, 2009 termination notice
 6 was proper, pursuant to Section 18.2(i) of the Franchise Agreement. Additionally, a
 7 default of the Franchise Agreement constitutes a default of the Sublease. *See* Sublease,
 8 § 16. In view of Kennedy Restaurants' blatant and repeated defaults under the Franchise
 9 Agreement, Denny's properly terminated the Sublease as well.

10 In addition to these pre-termination defaults, Kennedy Restaurants has continued to
 11 default on its payment obligations after the termination. In fact, since March 19 it has
 12 paid its royalties and rent late an additional *37 times* and has not made a single royalty or
 13 rent payment for the past 12 weeks in a row. It has also breached the Franchise
 14 Agreement by failing to report its sales for the past four consecutive weeks.² In short,
 15 under any objective measure, Kennedy Restaurants has materially breached, and continues
 16 to breach, the Franchise Agreement. Therefore, as a matter of law, Denny's termination
 17 of that agreement and the Sublease was proper. Indeed, it *must* be permitted to terminate
 18 these agreements under these extraordinary circumstances.

19 **B. Denny's Acceptance of Late Payments Did Not Constitute a**
 20 **Waiver of Its Right to Insist on Timely Payments.**

21 Defendants will likely argue that, because Denny's has accepted late payments in
 22 the past, this "course of dealing" obligated Denny's to accept late payments in perpetuity.

23
 24 _____
 25 ² This failure to report is also a breach of the Franchise Agreement and the Sublease, both
 26 of which require weekly reporting of sales data. *See* Franchise Agreement, § 7.3;
 Sublease, § 4(b).

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1 Therefore, the argument goes, Denny's did not properly terminate the Franchise
 2 Agreement on March 19, 2009. Any such argument is simply wrong.

3 The Franchise Agreement itself directly refutes this contention. Section 21.4
 4 makes it clear that Denny's acceptance of payment in one instance does not constitute a
 5 waiver of its right to demand timely payments:

6 The receipt and acceptance of by either party of any delinquent payment due
 7 hereunder *shall not constitute a waiver of any other default*. Except as
 8 provided by the foregoing, no delay or omission in the exercise of any right
 9 or remedy by either party upon any default by the other hereunder shall
 impair such right or remedy or be construed as a waiver of any term,
 covenant or condition of this Agreement to be performed by the other party.

10 (Emphasis added). Just as important, Section 21.4 provides that any purported "waiver"
 11 must be in writing: "Any waiver of any other default must be in writing and shall not
 12 constitute a waiver of any other default concerning the same or any other term, covenant
 13 or condition of this Agreement."

14 Thus, Denny's prior acceptance of late payments does not prohibit it from
 15 terminating the Franchise Agreement due to Kennedy Restaurants' chronically late
 16 payments. Moreover, Defendants have not offered any writing in which Denny's
 17 purported to waive its right to insist on strict compliance with the payment terms of the
 18 parties' agreements. Accordingly, Defendants' "course of dealing" argument fails as a
 19 matter of law.

20
 21 **C. Plaintiffs' Acceptance of Post-Termination Payments Does Not**
 22 **Constitute a Waiver of Their Right to Terminate the Franchise**
Agreement.

23 Defendants may also argue that even if they failed to comply with the Franchise
 24 Agreement, Plaintiffs' acceptance of *post-termination* payments amounts to a waiver of
 25 Plaintiffs' termination rights. Again, such an argument would be misplaced.

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1 In fact, other courts have considered, and rejected, that exact argument. *See, e.g.,*
 2 *Dunkin' Donuts Franchised Rests., LLC v. Cardillo Capital, Inc.*, 551 F.Supp.2d 1333
 3 (M.D. Fla. 2008). The court in *Cardillo*, considering facts that are identical to those in
 4 this case, very succinctly disposed of the franchisee's waiver argument:

5 Defendants' Answer asserts that Dunkin' Donuts has waived its breach of
 6 contract claims because plaintiffs "have continued to accept, and Defendants
 7 have continued to pay, franchise and advertising fees pursuant to all
 8 agreements as Defendants' business at each franchise permits, including the
 9 franchise and advertising fees referred to in the complaint." Under
 10 Massachusetts law, the burden of proving waiver is upon the party who
 11 makes the assertion. In order to establish waiver, the party must show clear,
 12 decisive and unequivocal conduct indicating that the opposing party would
 13 not insist that the contractual provision at issue be performed." *Brennan v.*
 14 *Carvel Corp.*, 929, F.2d 801, 810 (1st Cir. 1991) (internal citations omitted).
 15 This is an "uncompromising" standard. *Paterson-Leitch Co. v. Mass. Mun.*
 16 *Wholesale Elec. Co.*, 840 F.2d 985, 992 (1st Cir. 1988). The debit by
 defendants falls far short of the type of conduct necessary to establish
 waiver by plaintiffs of its rights to timely payments and non-use of the
 Dunkin' Donuts Marks after termination. Additionally, the parties agreed in
 the Franchise Agreements (§ 13.0) that such conduct does not constitute a
 waiver. Thus, as there is no evidence presented which supports a waiver by
 Dunkin' Donuts, summary judgment is granted in favor of plaintiffs as to
 Counts I through V.

17 *Id.* at 1337.

18 The Court should reach the same conclusion here. By accepting post-termination
 19 payments, Plaintiffs are merely mitigating the damages to which they are entitled under
 20 federal law due to Defendants' unauthorized use of the Denny's Marks. In addition to
 21 injunctive relief, the Lanham Act entitles Denny's to recover Defendants' profits, any
 22 damages Plaintiffs have sustained, and their costs of suit as compensation for Defendants'
 23 willful infringement. *See* 15 U.S.C. § 1117(a) (providing that once infringement is
 24 shown, "the plaintiff shall be entitled . . . to recover (1) defendant's profits, (2) any
 25 damages sustained by the plaintiff, and (3) the costs of the action"). Thus, whether
 26

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1 Kennedy Restaurants was using Denny's Marks as an authorized franchisee or an
 2 infringer, it must *pay* to use the marks. And as long as Kennedy Restaurants continues to
 3 use the Marks, Denny's is completely justified in accepting post-termination royalty
 4 payments.

5 A similar analysis holds true with regard to Denny's acceptance of post-
 6 termination rent payments. Clearly, Kennedy Restaurants is continuing to use and occupy
 7 the Premises. As long as Kennedy Restaurants continues to "hold over" after the
 8 termination of the Sublease, Denny's is entitled to collect rent. *See* A.R.S. § 33-323
 9 ("Every person in possession of land out of which rent is due is liable for the amount or
 10 proportion of rent due from the lands in his possession, although it is only a part of the
 11 land originally demised, without depriving the landlord of other legal remedies for
 12 recovery of rent."); *see also* A.R.S. § 33-342 ("When a lessee holds over and retains
 13 possession after expiration of the term of the lease without express contract with the
 14 owner, the holding over shall not operate to renew the lease for the term of the former
 15 lease, but thereafter the tenancy is from month to month.").

16 Allowing Kennedy Restaurants to use the Premises rent-free during the course of
 17 this lawsuit would only put Denny's in the difficult position of obtaining a judgment, and
 18 then trying to collect a year or more of past-due rent from an entity that could very well be
 19 insolvent. That result is both unfair and directly contrary to Arizona statutory law, which
 20 allows a landlord, like Denny's, to collect rent in these circumstances.

21
 22 **D. Denny's Is Entitled to a Permanent Injunction Prohibiting**
 23 **Defendants from Continuing to Use the Denny's® Trademarks.**

24 If the Court rules in Denny's favor on Count Four (for breach of the Franchise
 25 Agreement), Denny's is also entitled to a permanent injunction prohibiting Defendants
 26 from continuing to use the Denny's® name and trademarks. A ruling in Denny's favor on

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Count Four would mean that the March 19, 2009 termination notice was and is legally effective based on the enforcement of the termination clause of the Franchise Agreement. If the termination is proper, then Defendants are infringers because they lost the right to use to use the Denny's[®] trade name and trademarks as of March 19, yet they continue to use them. *See* 15 U.S.C. § 1114(1) (a person who uses a trademark without the permission of the registrant is liable for trademark infringement).

The Court has the authority to enjoin this conduct, and should do so in connection with its ruling on this Motion. The Franchise Agreement requires Defendants to cease using the Denny's[®] name and trademarks once their franchise is terminated. *See* Franchise Agreement, § 19.1(a) (stating that the franchisee must cease using "the Denny's Marks, including without limitation, all trademarks, trade names, service marks, logotypes, labels, designs and other identifying symbols and names pertaining thereto" upon termination of the Franchise Agreement). If Defendants continue to use the marks following termination, they may be enjoined from doing so:

Franchisee recognizes the unique value and secondary meaning attached to the Denny's System, the Denny's Marks, the Confidential Information and the associated standards of operation and trade practices, and Franchisee agrees that any noncompliance with the terms of this Agreement or any unauthorized or improper use will cause irreparable harm to [DFO] and its franchisees. *Franchisee therefore agrees that if it should engage in any such unauthorized or improper use, during or after the term of this Agreement, the Company shall be entitled to both permanent and temporary injunctive relief from any court of competent jurisdiction in addition to any other remedies prescribed by law.*

Franchise Agreement, § 21.12 (emphasis added). Accordingly, if the Court rules as a matter of law that Kennedy Restaurants breached the Franchise Agreement by making late payments and failing to make payments, the Court should enjoin Defendants from continuing to use the Denny's[®] trade name and trademarks.

1 **E. Denny's Is Entitled to an Order Directing Defendants to**
 2 **Surrender the Leased Premises.**

3 In Count Five of the Complaint, Denny's asks the Court to declare that the
 4 Sublease was properly terminated. Both the Franchise Agreement and the Sublease
 5 require Defendants to surrender the restaurant premises to Denny's in the event of a
 6 termination. *See* Franchise Agreement, § 19.1(b) (franchisee must, upon termination,
 7 “promptly and peaceably deliver and surrender . . . possession of the Restaurant building,
 8 parking lot, and fixtures”); Sublease, § 16 (upon Defendants' default, Denny's may
 9 exercise various remedies, including “re-enter[ing] and tak[ing] possession of the
 10 Premises”). The Court should, therefore, issue an order directing Defendants to do so.

11 **F. Denny's Is Entitled to Summary Judgment on the Counterclaim.**

12 **1. Denny's Did Not Breach the Parties' Agreements.**

13 In their Second Amended Answer and Counterclaim [Doc. #72], Defendants allege
 14 that Denny's breached the parties' agreements by seeking to terminate them in March
 15 2009. These allegations are based on the erroneous premise that, because Denny's
 16 accepted late payments from Kennedy Restaurants, it somehow waived the right to insist
 17 on timely payments, and thereby waived the right to terminate the Franchise Agreement
 18 and Sublease. As discussed above, Denny's was, and is, entitled to terminate the parties'
 19 agreement based on the 15 late payments that Kennedy Restaurants made between August
 20 2008 and January 2009 (not to mention the 37 late payments since then). And, as a matter
 21 of law, it did not waive any of its rights under either agreement. Accordingly, the
 22 termination was proper, and this aspect of Defendants' counterclaim should be dismissed.

23 **2. Denny's Did Not Overcharge Defendants for Rent.**

24 Defendants also allege that that, “by letter dated July 9, 2003, Denny's agreed to
 25 reduce Kennedy Restaurants' weekly rental payments under the Sublease to \$1,496.00.”
 26

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1 Counterclaim, ¶ 9. The Counterclaim goes on to allege that “Denny’s failed to implement
 2 this change, continuing to charge Kennedy Restaurants the original base rent.” *Id.* As a
 3 result, Kennedy Restaurants alleges that it has been “overcharged in excess of \$18,000.00
 4 in rental expenses.” *Id.*

5 As an initial matter, Defendants’ claim is barred by the statute of limitations, which
 6 is clear from the face of the pleading. According to the Counterclaim, Denny’s allegedly
 7 agreed to reduce Kennedy Restaurants’ weekly rental payments in July 2003. In Arizona,
 8 the limitations period for an action on a written contract is six years. *See* A.R.S. § 12-
 9 548.³ Assuming, *arguendo*, that the first rental payment under the new agreement was
 10 due sometime in July 2003, Defendants’ claim was time-barred no later than July 2009,
 11 six years after Denny’s allegedly failed to charge the reduced rent. The Counterclaim was
 12 filed in November 2009, *almost four months after the statute of limitations expired.* For
 13 that reason alone, Defendants’ counterclaim for these alleged rent overcharges should be
 14 dismissed.

15 More to the point, however, Denny’s never agreed to reduce the rent to \$1,496.00
 16 per week. The sole document on which Defendants’ claim rests – a letter from one of
 17 Denny’s former paralegals – is not the Sublease. It is merely a transmittal letter (one that
 18 apparently contains a typographical error as to the amount of the rent), and has no
 19 evidentiary value whatsoever. The *actual* agreement that the parties signed, the First
 20 Amendment of Sublease (“Amendment”), did, in fact, lower the weekly base rent – from
 21 \$1,596.69 to \$1,553.69, a reduction of \$43 per week. SOF, ¶ 33. This \$43-per-week
 22 reduction is exactly what Defendants had asked for.

23
 24
 25 ³ A.R.S. § 12-548 provides that, “[a]n action for debt where indebtedness is evidenced by
 26 or founded upon a contract in writing executed within the state shall be commenced and
 prosecuted within six years after the cause of action accrues, and not afterward.”

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The parties' original Sublease expired on May 31, 2003, and the original rent (including property taxes) was \$1,596.69. SOF, ¶ 34; *see also* Sublease, §§3(a), 2(a). During the course of the parties' negotiations for the renewal of the Sublease (which culminated in the signing of the Amendment), Dr. Burton wrote a letter to Denny's, dated June 16, 2003.⁴ SOF, ¶ 36. In it, he said: "If you will reduce the rent by \$43.00 per week (you will still make \$100/week), I will sign [the Amendment]." SOF, ¶ 36. Denny's did just that – it agreed to lower the rent from \$1,596.69 to \$1,553.69. SOF, ¶ 37. Once it did so, Dr. Burton signed the Amendment on behalf of Kennedy Restaurants. SOF, ¶ 38. The Amendment provided for the payment of weekly rent in the amount of \$1,553.69. SOF, ¶ 39. Kennedy Restaurants paid this rental amount, without question or complaint, *every week* for the next *six years*. SOF, ¶ 40.

Based on these facts, which are indisputable, Denny's is likewise entitled to summary judgment on Defendants' rent-overcharge claim. Denny's charged Defendants the exact amount of rent they agreed to pay when they signed the Amendment.

IV. CONCLUSION

Kennedy Restaurants made at least 15 late payments of royalties and rent between August 2008 and January 2009, subsequently paid late 37 times, and then stopping paying altogether. Kennedy Restaurants has also stopped reporting its sales, as it is contractually obligated to do. Accordingly, Denny's is entitled as a matter of law to terminate the parties' Franchise Agreement and Sublease. Denny's is also entitled to summary judgment on Defendants' Counterclaim. Denny's clearly did not breach the parties' agreements by seeking to terminate them, nor did Denny's overcharge Defendants' for

⁴ The negotiations for the Amendment continued until well after the original Sublease expired, which is why Dr. Burton's letter is dated after May 31, 2003, the effective date of the Amendment. SOF, ¶ 35.

1 rent, as alleged in the Counterclaim. The Counterclaim should therefore be dismissed in
2 its entirety.

3 Based on the foregoing, the Court should: (1) grant summary judgment in Denny's
4 favor on Counts Four and Five of its Complaint; (2) grant summary judgment in Denny's
5 favor on the Counterclaim; (3) issue a permanent injunction prohibiting Defendants from
6 using the Denny's[®] name and trademarks; and (4) issue an order directing Defendants to
7 immediately surrender the leased premises.

8 RESPECTFULLY SUBMITTED this 5th day of January, 2010.

9 GREENBERG TRAURIG, LLP

10 By: Aaron C. Schepler

11 Jeffrey H. Wolf

12 Aaron C. Schepler

13 Kami M. Hoskins

14 Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

☒ I hereby certify that on January 5, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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☐ I hereby certify that on _____, I served the attached document by U.S. Mail on the following, who are not registered participants of the CM/ECF System:

/s/ Marie E. Sanchez